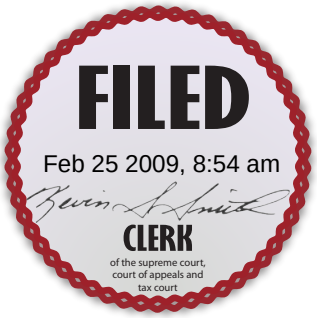

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IN THE
COURT OF APPEALS OF INDIANA

JUAN M. GARRETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0807-CR-609
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0706-FA-120521

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Juan Garrett appeals his conviction of rape, a Class B felony.[1] He argues his statements to the police were inadmissible and the evidence was insufficient. We affirm.

FACTS AND PROCEDURAL HISTORY

Early in the morning of June 9, 2007, A.W. reported to the police that three men forced her into a van, took her to an apartment, and forced her to submit to multiple acts of oral sex and vaginal intercourse. One of the perpetrators gave her a piece of paper with the name "Juan" and a phone number written on it. He told her "to call him again if [she] wanted to have a good time again." (Tr. at 368.) A.W. showed an officer the location of the apartment where she had been raped.

Police discovered the phone number and apartment belonged to Garrett. On June 25, 2007, Garrett went to the Sex Crimes Office and was interviewed by Detective Linda White and Sergeant Craig McCartt. Detective White gave Garrett *Miranda* warnings, which Garrett said he understood. She then read him an advice of rights form, which he said he understood and signed.

Garrett told the officers he had called off work on the evening of June 8 because he was sick, but he then went to the Embassy Suites for off-track betting. He claimed he returned home around 9:00 and went straight to bed. He denied that anyone was at his apartment that evening. When confronted with the note, Garrett said, "I meet a lot of people on the bus downtown. I have no idea from there." (State's Ex. 8 at 8.) Detective White asked Garrett if he would give a buccal swab, but Garrett refused.

[1] Ind. Code § 35-42-4-1.

Garrett's DNA was later obtained by court order, and his DNA matched a sample from A.W.'s rape examination. Detective White showed A.W. a photographic array, and A.W. identified Garrett as one of the perpetrators.

On June 27, 2007, Garrett was charged with Count 1, Class A felony rape (alleging he raped A.W. while armed with a knife); Count 2, Class A felony rape (also alleging he raped A.W. while armed with a knife); Count 3, Class B felony criminal deviate conduct;[2] Count 4, Class B felony criminal confinement[3] (alleging he confined A.W. in an apartment while armed with a knife); and Count 5, Class C felony criminal confinement (alleging he forced A.W. into a vehicle). The case was tried to a jury on April 14, 2008. The jury found Garrett not guilty of Counts 1, 3, and 5, but it could not reach a verdict on Counts 2 and 4.

Counts 2 and 4 were retried to the bench on June 5, 2008. A.W. testified that on the evening of June 8, 2007, she ended up in an apartment with three men she did not know. One man was older, and two were younger. After they entered the apartment, one of the men locked the door. She did not want to be there. She begged them to let her go because she had a sick child at home and needed to take care of him. The men refused, and said they were "going to do things to" her, and she feared they were going to hurt or kill her. (Tr. at 361.)

The apartment was a one-room studio containing a bed and couch. One of the men pushed her onto the couch, and the two younger men sat down beside her. The older

[2] Ind. Code § 35-42-4-2.
[3] Ind. Code §35-42-3-3.

man sat down on the bed. The men started drinking and smoking marijuana. She did not want to drink, but they squeezed her jaw and poured alcohol into her mouth.

After a while, the men pulled her clothes off. A.W. was forced onto the bed:

Q. How did you get over to the bed?
A. I was pulled over to the bed and pushed down on the bed.

* * * * *

Q. All right. When you were pushed down onto the mattress, what man were you with?
A. The older one.
Q. When the older man pushed you down on the mattress, what happened?
A. He stuck his penis inside of me and had sex with me.
Q. When you say he stuck his penis inside of you, what part of you?
A. In my vagina.

* * * * *

Q. When he put his penis in your vagina, how did that feel?
A. I didn't like it. It hurt.

(*Id*. at 363-64, 366.) A.W. identified Garrett as the man who had raped her. A.W. asked him to stop, but he did not.

While Garrett was having sex with her, she noticed a knife at the end of the bed. When he finished, he told her she could get dressed and leave. However, one of the younger men prevented her from leaving. She was finally allowed to leave after Garrett had sex with her again. Garrett gave her his phone number, and she also took the knife when he was not paying attention.

A.W. ran to a gas station down the street and called 911. A.W. gave the police the note and the knife and showed them where the apartment was. She was then taken to a hospital for an examination. The nurse testified A.W. "was tearful, upset, she was cooperative with me, but very uncomfortable, having some pain, rated I believe a 9 out of

10." (*Id*. at 392.) A.W.'s injuries included a chipped tooth, a hemorrhage in her eye, and bruises on several parts of her body.

The trial court found Garrett guilty of rape as a Class B felony, because A.W. had testified she had not seen anyone touch the knife. The trial court found him not guilty of criminal confinement, because A.W. testified one of the other men had prevented her from leaving after Garrett had sex with her.

DISCUSSION AND DECISION

1. Admissibility of Garrett's Statements

Garrett filed a motion to suppress the statements he made during the interview, arguing he had invoked his right to counsel. The trial court denied the motion and admitted the evidence over Garrett's objection at trial. "Our standard of review of rulings on the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by trial objection." *Jamerson v. State*, 870 N.E.2d 1051, 1054 (Ind. Ct. App. 2007). "The record must disclose substantial evidence of probative value that supports the trial court's decision. We do not reweigh the evidence and we consider conflicting evidence most favorably to the trial court's ruling." *Taylor v. State*, 689 N.E.2d 699, 702 (Ind. 1997).

> The right to have counsel present during an interrogation "is indispensable" to the protection of the Fifth Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S.Ct. 1602, 1625, 16 L.Ed.2d 694, 721 (1966). When a suspect asserts his right to counsel during custodial questioning, the police must stop until counsel is present or the suspect reinitiates communication with the police and waives his right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386 (1981).

Jolley v. State, 684 N.E.2d 491, 492 (Ind. 1997).[4]

> "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." [*Davis v. United States*, 512 U.S. 452, 459 (1994)] (internal quotation marks and citation omitted). The level of clarity required to meet the reasonableness standard is sufficient clarity such that a "reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* It is not enough that the defendant might be invoking his rights; the request must be unambiguous.

Taylor, 689 N.E.2d at 703. Officers are not required to ask clarifying questions to determine whether the suspect wants a lawyer. *Id.*

During the interview, Detective White asked Garrett if he would be willing to give a buccal swab so he could be eliminated as a suspect. He responded, "Not at this time, no. Not until I talk to an attorney, because again, it's almost like entrapment here. 'Cause again, I haven't done anything wrong." (State's Ex. 8 at 9.) The interview continued, and Garrett maintained his innocence. Sergeant McCartt questioned why Garrett wouldn't give a DNA sample if he was innocent, and the following exchange occurred:

> A. Well, again, I signed a piece of paper saying I can stop at any[]time.
> Q. Yes you did.
> A. Alright, and I'll stop at that point right there. 'Cause again ...
> Q. Stop at what point?
> A. I'm not giving no DNA.
> Q. Okay. So does that mean you don't want to talk to us anymore, or are you saying you just don't want to give DNA?
> A. I'm not giving any DNA.

(*Id*. at 13.)

[4] Garrett makes a single argument under both the United States and Indiana Constitutions.

Garrett did not unambiguously assert his right to have counsel present during the interview. He refused to give a buccal swab, but did not indicate any unwillingness to continue talking to the officers. The officers were not required to further clarify Garrett's request, *Taylor*, 689 N.E.2d at 703, but Sergeant McCartt specifically asked whether Garrett wanted to terminate the interview or whether he was simply refusing to give a DNA sample. Garrett replied, "I'm not giving any DNA." (State's Ex. 8 at 13.) Later in the interview, Garrett stated, "I'm done talking," and the officers ended the interview. (*Id*. at 21.)

Garrett argues:

> After requesting an attorney the detectives persisted and asked Mr. Garrett to specify that he wanted an attorney before giving up a DNA sample. This splitting of hairs should never have happened. . . . To permit the detectives to subvert the invocation of the right to counsel to a partitioning of the use of the words as to one aspect of your interrogation or another is to institute a requirement that a suspect be a legal and grammatical scholar to fully receive his constitutionally guaranteed rights to be represented by counsel and to remain silent.

(Reply Br. at 2-3.) He provides citations to *Edwards* and *Davis*, but we find nothing in those opinions to support Garrett's arguments. Nor are we inclined to accept his argument when the record reflects Garrett understood his right to refuse to give a DNA sample and his right to remain silent and distinguished between those rights by invoking them separately. The officers honored Garrett's rights by getting a court order for a DNA sample and terminating the interview when he invoked his right to silence. Therefore, the trial court did not err by admitting his statements.

2. Sufficiency of Evidence

When reviewing the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. *Potter v. State*, 684 N.E.2d 1127, 1136 (Ind. 1997). We look to the evidence favorable to the judgment and all reasonable inferences therefrom. *Id*. A conviction may rest solely on the uncorroborated testimony of the victim. *Id*. We will affirm if there is probative evidence from which the trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*.

Ind. Code § 35-42-4-1 provides "a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force" commits Class B felony rape.

> It is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined. This is a subjective test that looks to the victim's perception of the circumstances surrounding the incident in question. The issue is whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance. The element of force may be inferred from the circumstances.

Maslin v. State, 718 N.E.2d 1230, 1235 (Ind. Ct. App. 1999) (citations omitted), *trans. denied* 735 N.E.2d 220 (Ind. 2000), *overruled on other grounds by Ludy v. State*, 784 N.E.2d 459 (Ind. 2003).

Garrett argues the State did not meet its burden because it did not establish he used force against A.W. He points out that A.W. did not specify which of the three men locked the door, said they would "do things" to her, or removed her clothes. A.W. stated she was "pushed down on the bed," (Tr. at 363), and the prosecutor asked her, "When the older man pushed you down on the mattress, what happened?" (*Id*. at 364.) Without

explicitly confirming that Garrett was the one who pushed her onto the bed, A.W. responded, "He stuck his penis inside of me and had sex with me." (*Id*.)

Force is viewed from the victim's perspective, *Maslin*, 718 N.E.2d at 1235, and A.W. clearly perceived the men to be acting together. Even if it cannot be inferred from A.W.'s testimony that Garrett participated in stripping her, taking her phone, and pushing her, Garrett took advantage of A.W.'s helpless condition. As such, Garrett needed only minimal force to rape A.W. *Compare Taylor v. State*, 879 N.E.2d 1198, 1202-03 (Ind. Ct. App. 2008) (finding sufficient evidence of force to sustain conviction of kidnapping by hijacking where Taylor drove off in car where children were already restrained in car seats and doors locked automatically when he put car in gear; we noted only minimal force was needed to accomplish the carjacking as the victims were relatively helpless). She testified Garrett hurt her while they were having sex, and she emerged from her ordeal with multiple injuries, including bruising in the area of her vagina. A.W. asked Garrett to stop, but he did not. The trial court explicitly credited A.W.'s testimony and discredited Garrett's statements, and we will not second guess its credibility determinations. *Potter*, 684 N.E.2d at 1136. We conclude there was sufficient evidence the intercourse was nonconsensual and compelled by force.

Affirmed.

FREIDLANDER, J., and BRADFORD, J., concur.